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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES
(husband and wife),
Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.
(a corporation),
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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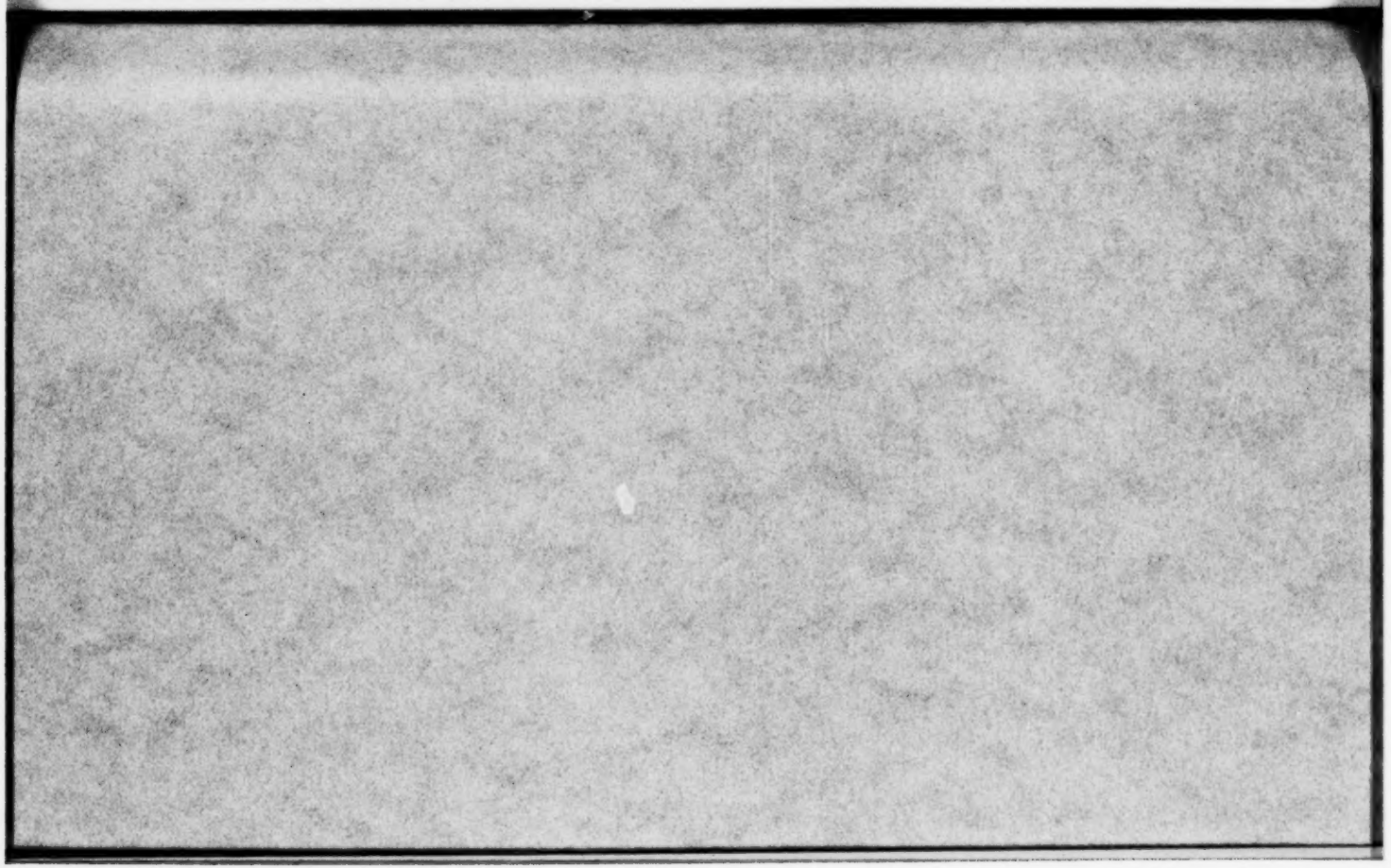

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On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition for a Writ of Certiorari should be denied for the following reasons:

(1) The decision of the Supreme Court of the State of California is in complete conformity with principles of law announced by this Court in a long line of decisions

and does not involve any new and undecided judicial principles.

(2) The decision below will not jeopardize titles to railroad or state lands. To accept petitioners' erroneous contentions would, however, upset innumerable titles and rights to mining lands throughout the West which have become established through the past three-quarters of a century on the faith of the decisions of this Court in similar cases.

(3) The case below received full consideration by the trial court, the District Court of Appeals, and the Supreme Court of the State of California. In each court an application for a rehearing was also made and fully argued. Of the eleven participating judges there was but one judge dissenting.

(4) California is a mining state where the mining law here under consideration originated in the customs of the early miners. The courts of California have had occasion to interpret these principles of mining law more often than the courts of any other state. Their decisions are, therefore, entitled to great weight in the consideration of these principles.

(5) The petition, the supporting brief, and the dissenting opinion contain many erroneous statements of both law and fact which are vital to a correct determination of the issues involved. The petition has not fairly presented the questions at issue to this Court.

(6) The petition and brief raise every question decided in the trial court and in the appellate courts below, even those involving the admissibility of evidence governed by California law exclusively. The trial court made Findings of Fact on every point in issue, and these were con-

curred in by the California Supreme Court. (R. 11-19, 379-381.)

RESTATEMENT OF FACTS.

The failure of the petition and brief to call this Court's attention to vital facts necessitates a brief fact restatement, in conformity with the trial Court's findings.

Respondent's Title.

As early as 1863 both the Pennsylvania and Jefferson locations were in possession of and being worked by the then owners, the Pennsylvania and Jefferson Mining Companies respectively, and great values in gold were thereafter produced from each mine. (R. 50, 52, 53, 54, 57, 61-6, 75, 77, 234-242, 274-7, 282, 284, 303-9, Findings of Fact 3 and 9, R. 12 and 9.) The Pennsylvania and Jefferson claims are coterminous, the top edge or apex of the included vein extending through the center of each claim from end line to end line. On its descent into the earth this vein dips easterly and passes beyond the side lines of the two claims and beneath a 200 foot wide strip of state school land and then, at a vertical depth of about 600 feet from the surface, enters beneath the "Ames tract" railroad land and has been progressively mined on its dip beneath that tract to a depth of 1000 feet or more. (The relative position of the workings on the vein and the surface areas appear on map opp. p. 12, petition. See also Findings of Fact 5, 6 and 15 R. 12-15.) As shown by this map, the Jefferson vein is but the onward extension on strike of the Pennsylvania vein. The mine workings, consisting of two separate shafts, sunk on the inclination of the vein from its top or apex at the surface of each of the

Pennsylvania and Jefferson claims respectively and levels extending therefrom had penetrated beneath the subsurface of the Ames tract at and prior to July 25, 1866, the date of the railroad grant act at which date neither section 15 or 16 had been surveyed. (R. 15, 16, Findings 12, 13.) The Pennsylvania location was patented August 18, 1880, to the Pennsylvania Mining Company (R. 254), the Certificate of Final Entry, which is for legal purposes the equivalent of patent (*El Paso Co. v. McKnight,* 233 U. S. 250, 257), having issued May 31, 1880 (R. 252) or 15 days prior to the issuance of petitioners' railroad patent, June 14, 1880. A complete chain of title vests the right to work the Pennsylvania mine in respondent. (Finding 8, R. 14.)

Respondent has also succeeded to the right to mine the Jefferson unpatented mining location. The petition (pp. 7, 8, 45) is in error in stating that title to this mining location and the right to follow the vein therefrom extralaterally under the Ames tract is a question here in issue. The trial court (R. 18) and the California Supreme Court (R. 379), including even the dissenting justice (R. 413), each decided that, because of the express reservation of the Jefferson vein from the only conveyance under which petitioners claim title to the Ames tract of railroad land and the fact that respondent had succeeded to this reserved right to mine the Jefferson vein, it was unnecessary to pass upon the validity of the Jefferson location and its right to follow the vein on dip. (Findings of Fact 14-19, R. 16-18.)

Petitioners' Title.

The "Ames Tract" in Section 15, beneath which at great depth (600 to over 1000 ft.) the Pennsylvania vein

extends on its dip, was patented June 14, 1880 to the railroad company, pursuant to Act of Congress of July 25, 1866. (14 Stat. 239.) This act and the patent (R. 209, 211) expressly excepted "all mineral lands". The railroad filed its map of definite location of its road July 27, 1870. (R. 12, Finding 2.)

THE TRUE ISSUE.

As we shall point out, the mineral exception contained in the Railroad Act of 1866 is operative up to the very date of the railroad patent. Any mineral title, either to the surface of the railroad land or to any vein dipping beneath the railroad land and apexing in "land adjoining", could be acquired, good as against the railroad patent, up to its very date, which was June 14, 1880. Therefore, the real issue is not, as petitioners erroneously state, one of seniority of title (petition 2, 5, 7) but rather whether prior to June 14, 1880, title to the extralateral segment of the Pennsylvania vein had been acquired by respondent's predecessor so as to have been legally severed from the subsurface of the Ames tract and thus excepted from the patent to the railroad company. Because of the express mineral exception in this railroad act, it is wholly immaterial that the railroad act antedated the Mining Act of July 26, 1866, by one day.

CONGRESS, LONG PRIOR TO THE MINING ACT OF JULY 26, 1866, HAD RECOGNIZED THE RIGHTS OF MINERS ON THE PUBLIC DOMAIN.

Counsel erroneously refer to the Mining Act of July 26, 1866, as "the first mining act of Congress". (Petition 2,

11, 25, 26.) On February 27, 1865 (13 Stat. 440) Congress enacted that, "No possessory action between individuals *in any of the courts of the United States for the recovery of any mining title*"* should be affected by the fact that the paramount title was in the United States. This provision in the act has been held to apply to the Public Domain in all the mining states and is now codified as §*910 U. S. Rev. Stats.*

Sparrow v. Strong, 3 Wall. (70 U. S.) 97, note on p. 100;

Belk v. Meagher, 104 U. S. 279, 283-4;

Lindley on Mines (3rd Ed.) §47, p. 84; §538, pp. 1199-1200.

Again on May 5, 1866, Congress legislated (14 Stat. 43) concerning "valid subsisting mining claims" in Nevada and "possessory titles (to mineral lands) *in the mining States and Territories*".

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62;

Walrath v. Champion M. Co., 171 U. S. 293, 302-5.

THE RIGHT CREATED BY THE MINERS IN THE EARLY 1850's TO FOLLOW THE VEIN EXTRALATERALLY BENEATH THE SURFACE OF "ADJOINING LAND" WAS FURTHER APPROVED AND CONFIRMED BY THE MINING ACT OF JULY 26, 1866. (14 STAT. 251.)

This act was the first mining act to provide for issuance of a patent to a mining claim. (§§2 and 3 of 14 Stat. 251.) Section 4 thereof grants to "locations" (not patented claims as counsel erroneously contend at pp. 4, 11, 30, 45) "the right to follow such vein to any depth

*Italics in this brief are ours.

with all its dips, variations and angles * * *". This right later was called the "extralateral right".

This obvious construction of the plain terms of the act is confirmed by its authors, Senators Stewart and Conness.

> "This bill provides for selling the vein and following it into the earth with its natural dips and angles." (Stewart.)
>
> *Congressional Globe,* June 18, 1866, p. 3452.

> "* * * the miner is authorized to follow every vein according to its dips, angles and variations." (Conness.) (id. p. 3233.)

> "Explanations given on the floor of the Senate * * * by those in charge of the measure"

afford enlightenment for the courts.

> *Wright v. Vinton Branch,* 300 U. S. 440, 463.

See also Senator Stewart's extended remarks concerning the purpose of this act found as an appendix in 70 U. S. 777-780.

This Court *commenting on this Mining Act of 1866* has said:

> "* * * the owner of a mining right in a vein or lode may follow the dip to an indefinite distance outside his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the Acts of Congress."
>
> *Flagstaff M. Co. v. Tarbet,* 98 U. S. 463, 467.

This Court then quotes from §4 of the Act of 1866 which gives the owner of a "location" (not a patented claim) "the right to follow such vein to any depth". (id.)

See, also,

Walrath v. Champion M. Co., 63 Fed. 552 and

Lindley on Mines (3rd Ed.) pp. 1252-5, 1256

where Judge Lindley very definitely says that the Mining Act of 1866 confirmed the "dip rights" of "*unpatented* claims" and

> "was in effect a proclamation severing veins and lodes * * * from the body of the public domain".

Section 2 of the Mining Act of 1866 specifically provided that *the "land adjoining shall be sold subject to this condition"* viz.: "the right to follow such vein or lode * * * to any depth although it may enter the land adjoining * * *".

This right to pursue veins in depth could be enjoyed without the necessity of securing patent, contrary to petitioners' erroneous contention. (Petition, 26-28.) A valid mining location has the effect of a grant from the government "as good as though secured by patent".

Forbes v. Gracey, 94 U. S. 762, 766-7;
Belk v. Meagher, 104 U. S. 279, 283;
Chambers v. Harrington, 111 U. S. 350, 352-3;
Wilbur v. Krushnic, 280 U. S. 306, 316-317;
Ickes v. Development Corp., 295 U. S. 639, 644.

It is also a grant of the vein apexing therein, "throughout its depth" and the vein is thereby severed from "the land adjoining".

Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467;
Iron Silver M. Co. v. Cheesman, 116 U. S. 529, 531, 533;
Del Monte Co. v. Last Chance Co., 171 U. S. 55, 66-7, 87, 91;

St. Louis M. Co. v. Montana M. Co., 194 U. S. 235, 237;

Stewart M. Co. v. Ontario M. Co., 237 U. S. 350, 353;

Jim Butler v. West End M. Co., 247 U. S. 450, 454-5.

Therefore, the result is inescapable that when the Ames tract was sold to the railroad and patented on June 14, 1880, the Pennsylvania vein, which had been located and worked as early as 1863, owned continuously thereafter and Final Certificate of Entry for which had issued May 31, 1880, had long since been severed from the overlying railroad surface.

THE SETTLED POLICY OF CONGRESS AT ALL TIMES WAS TO EXCLUDE "MINERAL LANDS" FROM ITS GRANTS TO STATES AND TO RAILROADS.

Congress passed many acts of grant to both railroads and states, including the Railroad Act of July 25, 1866, expressly excepting "minerals" and "mineral lands" from such grants.

> These acts "were but expressive of the will of Congress that *every grant of public lands*, whether to a state or otherwise, should be taken as reserving and excluding mineral lands * * *".
>
> *United States v. Sweet*, 245 U. S. 563, 567-570;
>
> *Lindley on Mines* (3rd Ed.) §§152, 154.

RIGHTS TO MINERAL LANDS IN RAILROAD SECTIONS CAN BE LAWFULLY ACQUIRED BY MINERS UP TO THE VERY DATE OF THE PATENT TO SUCH RAILROAD LANDS.

The leading cases by this Court announcing this rule are

Barden v. N. P. R. R., 154 U. S., 288, 312-3, 316-7, 318-9, 321;

N. P. R. R. v. Sanders, 166 U. S. 620, 633-4;

Wyoming v. United States, 255 U. S. 489, 507-8.

See also

Lindley on Mines (3rd Ed.) §154, p. 289.

The *Sanders* case above noted, and many others that could be cited, answer the position taken by petitioners that at the date of the passage of the Railroad Act of July 25, 1866, Congress had not sanctioned the location of mineral lands. Congress by its Act of February 27, 1865, had already recognized the miners' possessory rights, but the *Sanders* case says even this was unnecessary:

> "It is quite true that at the time of the passage of the (Railroad Grant) act of 1864 there was no Act of Congress under which a right or claim could be initiated to mineral lands. But as said by Mr. Justice Field in *Jennison v. Kirk*, 98 U. S. 453, 458, 'for eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the States, constituted the law governing property in mines and in water on the public mineral lands'. And on July 26, 1866, *before the general route of the Northern Pacific Railroad was fixed*, Congress passed an act looking to a sale of the mineral lands of the United States, and declared them to be 'free and open to exploration and occupation by citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as

may be prescribed by law and the local customs or rules of miners in the several mining districts so far as the same were not in conflict with the laws of the United States'. In *Broder v. Water Co.*, 101 U. S. 274, 276, it was said to be the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, were rights which the Government had by its conduct recognized and encouraged, and was bound to protect, *before the passage of the act of 1866.* The act of 1866 was held to be a statutory recognition of the right to explore for mineral lands. That right was in nowise impaired, in respect of the lands in question, by the subsequent acceptance from the Northern Pacific Railroad Company of its map of general route. And that act was supplemented by the act of May 10, 1872, c. 152, 17 Stat. 91. *The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress,* and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. *Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.*" (pp. 634-5.)

N. P. R. R. Co. v. Sanders, 166 U. S. 620, 634-5.

THE CASES RELIED ON BY PETITIONERS EITHER DO NOT INVOLVE MINERAL LANDS OR ARE DISTINGUISHABLE ON OTHER GROUNDS.

Petitioners (pp. 16-17) cite the cases of *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, to the effect that railroad grants operate *in praesenti,* the title conveyed by a railroad patent relating back to the date of the railroad grant. No one denies this

to be the general rule. But neither of those cases involved mineral lands. Justice Field wrote the opinions in both cases. In the later *Barden* case (which involved mineral lands) Justice Field distinguished them, saying:

> "In both those cases the writer of this opinion had the honor to write the opinions of this court; *and it was never asserted or pretended that they decided anything whatever respecting the minerals.*"
>
> *Barden v. N. P. R. R. Co.*, 154 U. S. 288, 315.

Petitioners also (pp. 3, 19, 20, 21, 23, 25) urge that the cases of *Burke v. S. P. R. R. Co.*, 234 U. S. 669 and *West v. Standard Oil Co.*, 278 U. S. 200, support their contention that the railroad patent to the Ames land, once issued, concluded any possibility of any third party from thereafter asserting title to either the surface or subsurface of that land. As far as surface rights are concerned this is correct. But respondent is not claiming any surface rights in the Ames land. All that it is claiming is the right to follow its Pennsylvania vein extralaterally into the subsurface of this adjoining railroad land "which land adjoining shall be (and was) sold subject to this condition". (§2 of 14 Stat. 251.)

The Burke case involved only surface conflicts between railroad patented lands and placer mining locations *initiated 14 years after the date of the railroad patent.* (See 234 U. S. at p. 676.) No extralateral rights were involved in the *Burke* case.

The *West v. Standard Oil case* is similarly inapplicable because no extralateral rights were involved. The case is important, however, in demonstrating the fact that without a hearing and determination of non-mineral character by the Land Department, title to school land did not pass under a State patent.

Counsel also cite (p. 26) cases by inferior courts describing the early miners on the public domain as "trespassers". While technically true in the very early days, the following cases decided by this Court hold that the miners' rights were later definitely recognized by Congress and the courts.

Sparrow v. Strong, 3 Wall. (70 U. S.) 97, 104;
Atcheson v. Peterson, 20 Wall. (87 U. S. 507, 512;
Jennison v. Kirk, 98 U. S. 453, 458;
Broder v. Water Co., 101 U. S. 274, 276-7;
Chambers v. Harrington, 111 U. S. 350, 352-3;
Barden v. N. P. R. R. Co., 154 U. S. 288, 318-320;
N. P. R. R. v. Sanders, 166 U. S. 620, 634;
Central Pacific Ry. Co. v. Alameda Co., 284 U. S. 463, 471.

Counsel except to the State Supreme Court's holding (R. 375) that the railroad grant remained a "float" as to the Ames tract until the issuance of railroad patent in 1880. It is true that the railroad filed its map of definite location of the road in 1870 and that the grant then ceased to be a "float" in one sense. But as far as mineral lands are concerned the status of the railroad lands was still a "float" for, under the rulings of this Court, mineral title to the railroad land may be acquired up to the very date of the railroad patent, and hence no one may say prior to such date that the "inchoate" railroad title will ever attach. The point made by petitioners' counsel is, however, of no consequence because the title of respondent's predecessors to the Pennsylvania mine became vested long prior to 1870 and the vein had, therefore, long prior to that date been severed from the "land adjoining" by specific Congressional enactment. (Act of July 26, 1866.)

Counsel also erroneously assert that the California Supreme Court held that the railroad patent granted

> "title to the surface only of said lands * * * that title to the subsurface of said lands remained in the United States * * *." (Petition, pp. 4, 10, 11, 14, 19.)

While there is language in the majority opinion which, if isolated, might be so construed, nevertheless, an opinion, like any other document, must be read as a whole. That the California Supreme Court had no intention of holding as counsel suggest is proven by the following language of the opinion:

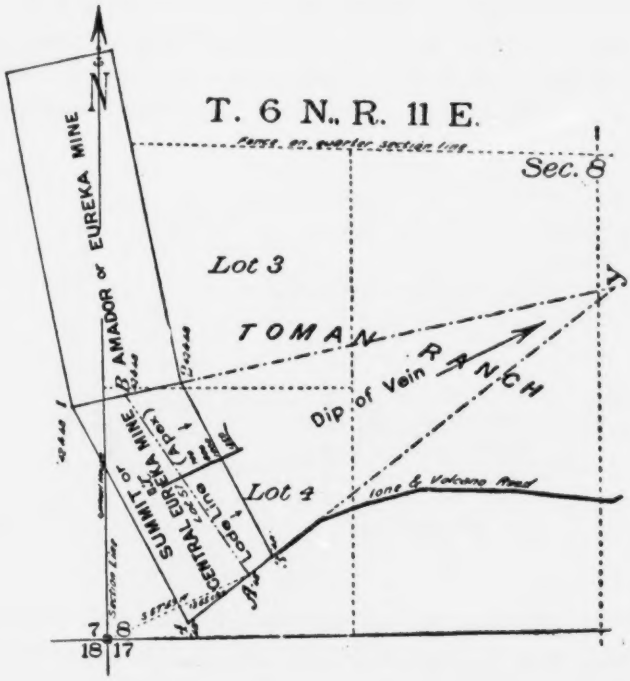
> "Thus, the patent which determined that the Ames Tract was agricultural applied only to the surface of the land *and that portion of the subsurface not already subject to existing extralateral rights.*" (R. 377.)

The language of the opinion which immediately follows also shows clearly that, *except for "existing extralateral rights"* petitioners are held by the California Court to be the owners of *"the subsurface mineral land* of the Ames tract" by virtue of the railroad patent.

THIS COURT HAS ALREADY DECIDED THE MAJOR ISSUE IN FAVOR OF RESPONDENT AND ALL OF THE AUTHORITIES SUPPORT THIS HOLDING.

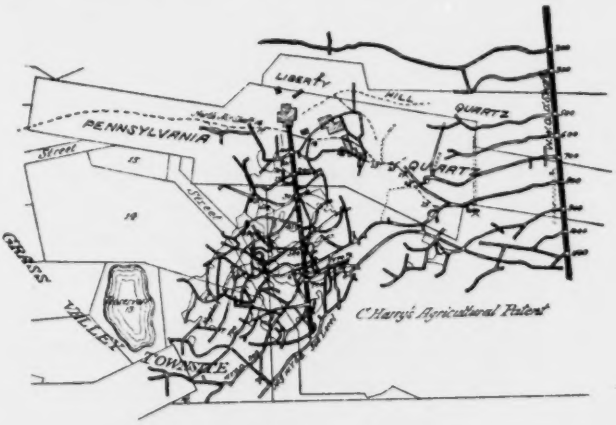
The case of *East Central Eureka M. Co. v. Central Eureka M. Co.*, 204 U. S. 266 involved a lode mining claim located in 1863. Mining patent issued November 25, 1873, after the passage of the Mining Act of 1872. This Court

upheld the right of the mining claimant to follow the vein extralaterally beneath the surface of the adjoining "Toman Ranch", patented as agricultural land. (The illustrative diagram, p. 1272, *Lindley on Mines,* 3rd Ed. §574 is here reproduced.) This Court said that the part of



the vein under the agricultural patented Toman Ranch "was embraced in the (mining) patent to plaintiff" and "*severed from the surface*" of the agricultural patent. (204 U. S. at p. 272.) If petitioners are correct in their contention that a non-mineral patent to land conveys not only the surface, but everything vertically beneath the surface, including the extralateral segment of a vein penetrating such

subsurface, then petitioners must also contend that this Court erroneously decided the *Central Eureka* case. That case standing alone is a complete answer to the preposterous contention that the mining law was intended by Congress to be in force only as between mining claimants. (Petion, 16, 29.) See *Pennsylvania M. Co. v. Grass Valley M. Co.*, 117 Fed. 509, 516, where the right of a mining claimant to follow his vein beneath patented agricultural land was also upheld. (Illustration of that case is on p. 1483, *Lindley on Mines* and is here reproduced.) (See also *Paterson v.*



Ogden, 141 Cal. 43, 45, *Amador Median Co. v. South Spring Hill Co.*, 36 Fed. 668, 670; *Pacific Coast Co. v. Spargo*, 16 Fed. 348, 349, 350; *Anaconda Copper M. Co. v. Pilot Butte M. Co.* (Mont.), 156 Pac. 409, 412; *Reeves v. Oregon Exploration Co.*, (Ore.) 273 Pac. 389, 390-1, to the same effect.)

The text writers also unanimously support the doctrine that where the location of a mining claim embracing the apex of the vein antedates an agricultural patent beneath which the vein dips, the mine owner owns the extralateral

vein segment which is severed from the surface of the overlying land.

Lindley on Mines (3rd Ed.) §612;
Costigan on Mining Law, p. 450;
Ricketts, American Mining Law, §§172, 945;
Morrison's Mining Rights (16th Ed.), p. 210;
Snyder on Mines, p. 658, §760, p. 766, §865;
Martin on Mining Law, p. 236;
Kenny, The Law of the Apex, pp. 210-214.

THE CASE OF BRODER v. NATOMA WATER CO., 101 U. S. 274, IS DECISIVE OF THE FACT THAT MINING RIGHTS POSSESSED AND ACQUIRED PRIOR TO RAILROAD GRANTS ARE CARVED OUT OF AND RESERVED FROM THE OPERATION OF RAILROAD PATENTS.

In that case a mining ditch had been constructed in 1853. Railroad grants were enacted by Congress in 1862 and 1864 and railroad patent for the land over which the ditch was located issued June 27, 1867. (See case below, 50 Cal., 621, 622.) The mining ditch was, therefore, located across the land prior to any Congressional enactment, just as here the Pennsylvania vein apex was located prior to the Railroad Act of July 25, 1866. In the *Broder* case the right to the mining ditch was confirmed by §9 of the Mining Act of 1866. Sections 2 and 4 of the same act confirmed the miners' right to locate and follow the Pennsylvania-Jefferson vein extralaterally. This Court said in the *Broder* case at p. 276 that the

> "rights of miners, who had taken possession of mines and worked and developed them" (are analagous to) "the rights of persons who had constructed canals and ditches to be used in mining operations * * *."

These rights the government

> "was bound to protect, before the passage of the (mining) act of 1866." (Which act) "was rather a voluntary recognition of a *pre-existing right* * * * rather than the establishment of a new one." (101 U. S. at p. 276.)

See also to the same effect:

Central Pacific Ry. v. Alameda Co., 284 U. S. 463, 468, 471;

Cramer v. United States, 261 U. S. 219, 229.

THE CERTIFICATE OF FINAL ENTRY OF THE PENNSYLVANIA MINE ANTEDATED THE RAILROAD PATENT BY 15 DAYS.

On May 31, 1880, Final Certificate of Entry for the Pennsylvania Mine was issued. (R. 252.) This Court has held this Final Certificate to be the equivalent of patent.

El Paso Brick Co. v. McKnight, 233 U. S. 250, 257.

On the other hand the railroad patent was subject to the initiation of valid mineral claims and rights up to the very date of its issuance. (June 14, 1880.)

Barden v. N. P. R. R., 154, U. S. 288, 311-3;

N. P. R. R. v. Sanders, 166 U. S. 620, 633-4;

Lindley on Mines (3rd Ed.) §154, p. 289.

Upon this very simple and valid ground the California District Court of Appeals based its decision in this case.

Ames v. Empire Star Mines Co. (Cal. App.) 93 Pac. (2d) 635, 641.

There is, therefore, not only priority of location right in favor of respondent, but also priority of patent right.

SCHOOL LAND IN SECTION 16 WAS AT ALL TIMES SUBJECT TO THE RIGHT OF THE PENNSYLVANIA CLAIM OWNERS TO PURSUE THEIR VEIN EXTRALATERALLY BENEATH IT.

The same reasons which govern in the case of railroad lands also apply to the strip of state school land, 200 feet wide, owned by respondent, which intervenes between its Pennsylvania lode claim and the Ames railroad land. Congress never intended that minerals should pass under school land grants if the minerals were known to exist at the date of approval of the survey of the school section. The Pennsylvania mine was actively worked long prior to 1863. By 1867 when the official survey of Section 16, in which the mine is situated, was approved, the mine workings following down on the vein had penetrated entirely through the subsurface of this strip of school land and had entered the subsurface of the railroad land beyond. (R. 15-16; Findings of Fact, 12 and 13.) That a state patent to school land issued May 22, 1882, or two years later than the date of the patent to the Pennsylvania mine, could not operate to cut off the extralateral rights of the Pennsylvania mine see:

United States v. Sweet, 245 U. S. 563, 567-570;
West v. Standard Oil Co., 278 U. S. 200, 219;
Sliger Gold Mining Co., 56 L. D. 67, 71;
United States v. State of California, 55 L. D., 121, 129-130, 532, 538-540.

THE PENNSYLVANIA LODE MINING CLAIM, 1540 FEET IN LENGTH, WAS PATENTED PURSUANT TO THE MINING ACT OF 1866.

The petition (pp. 4, 30-1), erroneously states that "the California Supreme Court held that a claim *patented under the mining act of May 10, 1872* (17 Stat. 91) of

more than 1500 feet in length had extralateral rights". On the contrary, the Supreme Court of California definitely held that the patent to the Pennsylvania claim for 1540 feet was "issued in pursuance to the earlier act of July 26, 1866, on the basis of an earlier location". (R. 378.) The record bears this out. (R. 12-13.) The Mining Act of 1866 did not limit claims to 1500 feet in length. The Register's Final Certificate of Entry was issued "in pursuance of the Mining Act of Congress, approved July 26, 1866", etc. (R. 252.) Furthermore, the Pennsylvania claim was a consolidation of three claims. (R. 239-240, Finding of Fact, 3, R. 12.) This and other Courts have recognized as valid, mining claims located in the 1860's which were patented subsequent to the Mining Act of 1872, which far exceed 1500 feet in length. (*Lawson v. U. S. Mining Co.*, 207 U. S. 1, patent issued in 1877, claim over 5000 ft. in length; *Pennsylvania M. Co. v. Grass Valley Co.*, 117 Fed. 509, patent issued 1879, lode 2838 ft.; *Carson City M. Co. v. North Star M. Co.*, 73 Fed. 597, patent issued 1875, lode 3140 feet; *Wyoming Co. v. Champion Co.*, 63 Fed. 540, patent issued 1874 for Wyoming lode, 2270 ft., in 1880 for Ural lode 2000 feet.)

The Mining Act of 1872 repealed the Mining Act of 1866 §16 (17 Stat. 91), but provided that

> "nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

It also specifically provided:

> "That mining claims * * * *heretofore located*, shall be governed as to length along the vein or lode, by the customs, regulations and laws in force at the date of their location." Claims "located after the passage

of the Act * * * shall not exceed 1500 feet in length". §2320 U. S. Rev. Stats.)

THE REMAINING CONTENTIONS OF PETITIONERS DEAL WITH THE ADMISSIBILITY OF EVIDENCE UNDER THE LAWS OF CALIFORNIA. DECISION UPON THESE QUESTIONS WAS ADVERSE TO PETITIONERS IN THE TRIAL COURT AND THESE RULINGS WERE UPHELD BY THE CALIFORNIA SUPREME COURT. SUCH RULINGS MAY NOT BE MADE THE BASIS FOR GRANTING CERTIORARI HERE.

The rulings on admission of evidence and the findings of the trial court (R. 11-20) negative every adverse contention made by petitioners' counsel as to the dates and facts which establish the valid location of the Pennsylvania and Jefferson claims in conformity to the miners' "customs, regulations and laws in force at the date of their location". The Supreme Court affirmed these rulings on admission of evidence and findings of the trial court in its opinion. (R. 371, 379, 381.) Petitioners made no attempt to controvert any of this evidence. The assertion of counsel for petitioners that respondent's derraignment of title was insufficiently made (Petition, p. 42) is, moreover, contrary to their own stipulations made in open court. (R. 38-41.) Their statement that the trial court gave them "no opportunity to object to the admissibility of the documents abstracted * * *" (Petition, 37) is also contrary to the fact. The trial court gave them every opportunity for "checking over the record and making such objections as they are advised". (R. 41.)

Such evidentiary rulings and findings, even if erroneous, cannot be made the basis for certiorari from this Court:

Dower v. Richards, 151 U. S. 658, 663;

Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 222;

Chrisman v. Miller, 197 U. S. 313, 319;
Los Angeles Farming and Milling Co. v. Los Angeles, 217 U. S. 217, 226;
Chapman and Dewey Land Co. v. Bigelow, 206 U. S. 41, 45;
Barrington v. Missouri, 205 U. S. 483, 486, 487;
West v. Louisiana, 194 U. S. 258, 260;
Hughes, Federal Practice, Vol. 5, §§3257-3260.

THE DISSENTING OPINION.

Counsel rely heavily (Petition, 11-12, 15-16, 45) on the dissent of but one judge of the California Supreme Court where the case was given unusual and careful consideration. Many misstatements of both fact and law appear in the dissenting opinion which have already been covered by this reply. But the partisan and nonjudicial character of the dissenting opinion is best evidenced by its wholly unwarranted and intemperate criticism of the views of the other six justices who joined in the majority opinion. (R. 386, 390.)

THE EQUITIES.

The Pennsylvania and Jefferson claims were located and mined over 75 years ago. Workings on the dip of the vein had already extended beneath the surface of the Ames tract over 70 years ago. (R. 16.) Extensive mining on this vein has been carried on underneath Ames tract surface at various times since. This right to mine there had not been challenged during all these years until this suit was brought in 1937. Petitioners have not contributed one cent to the development of this vein and yet seek to

take this large investment from respondent after nearly three-quarters of a century has elapsed since these mining rights were initiated. They do so on the theory that away back in 1880 the nonmineral railroad patent took away from respondent's predecessor the property in the subsurface segment of the vein, and that such already known mineral rights became merged in the nonmineral patent to the surface. Respondent respectfully submits that the decisions to the contrary by the three California courts below are eminently fair and correct, that they are in thorough accordance with this Court's decisions and that they should not be disturbed.

Dated, San Francisco, California,
September 2, 1941.

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